


Memorandum

To : Stephen R. Rudd, Chief
Environmental Fees Division – MIC:57

Date: February 20, 2003

From : Monica Gonzalez Brisbane 
Senior Tax Counsel – MIC:82

Subject: Request For Legal Opinion
#03-01 Environmental Fee

This is in response to your January 27, 2003 memorandum addressed to Assistant Chief Counsel Janice Thurston concerning the

is a California non-profit corporation whose income may qualify under federal income tax law for certain federal tax exemptions. According to your memorandum, has requested a refund of the environmental fee it paid pursuant to Health and Safety Code Section 25205.6, arguing that it should be exempt since it is an instrumentality of the State of California.

CONCLUSION

We previously addressed this same issue (Annotation 12/20/91). For the reasons set forth below and consistent with our previous opinion, I conclude that being characterized as an instrumentality of the state for federal income tax purposes does not exempt from the environmental fee.

DISCUSSION

states that it is “an auxiliary of University, and as such is considered an instrumentality of the State,” and, therefore, should not be subject to the environmental fee.¹ In support of its argument that the environmental fee should not apply, enclosed a private letter ruling issued by the Internal Revenue Service to the North Campus-University Park Development Corporation, an organization affiliated with California State University, Northridge (copy attached). First, the letter ruling applies only to the party

¹ While it is not clear what means when it describes itself as an “auxiliary of State University,” the website in an overview description states, “has been organized to function as a self-contained private corporation, separate from the University, yet integrated into the goals and programs of , and responsible for many activities that require financial support not provided by the State.”

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who requested it and second, the letter ruling addresses only federal income tax consequences of certain activities under the Internal Revenue Code. As such, the private letter ruling is not applicable to this situation.

Section 25205.6 of the Health and Safety Code imposes the environmental fee on every corporation identified in a list of SIC ("Standard Industrial Classification") codes the Department of Toxic Substances Control ("DTSC") provides to the Board. The list provided by DTSC contains all SIC codes except the code for households and the one statutory exemption to the environmental fee for a "nonprofit corporation primarily engaged in the provision of residential social and personal care for children, the aged ... as described in SIC Code 8361." (Health & Saf. Code, §25205.6(g).) Otherwise, the environmental fee is assessed on all other corporations authorized to do business in California. According to the information you provided, [redacted]'s SIC code is 8733 which is not one of the two exempt SIC codes. Therefore, [redacted] is subject to the environmental fee.

While [redacted] may be a corporation that is "an auxiliary of [redacted] University, and as such is considered an instrumentality of the State" by the Internal Revenue Service, it is nonetheless a separate and distinct California corporation for which there is no exemption from the environmental fee. [redacted] is subject to the duties and responsibilities of any other California corporation, including payment of the environmental fee.

Please let me know if you have any further questions concerning this matter.

MGB/ef
Attachment

cc: Ms. Janice L. Thurston – MIC:82
Mr. David Gau – MIC:63
Ms. M. Judith Nelson – MIC:82
Mr. Dennis Mahoney, Dept. of Toxic Substances Control

Internal Revenue Service

Department of the Treasury

Index No. 103.02-02

Washington, DC 20224

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Person to Contact:

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(202) 622-3980
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CC:DOM:FI&P:5/PLR-109974-97
Date:

Legend:

Authority = California Statewide Communities
Development Authority
E.I.N. 52-1598225

Corporation = North Campus-University Park Development
Corporation E.I.N. 95-4115921

State = State of California

University = California State University, Northridge

University System = California State University System

Authority
Resolution = Resolution No. 96NP-13, adopted on
December 4, 1996

a = 8,000,000

Dear Mr. Martini:

This is in response to your request for a ruling on behalf of the Authority that the Corporation is an instrumentality of the State for purposes of § 103 of the Internal Revenue Code.

Facts

You make the following factual representations. The Authority is an agency of the State which regularly issues bonds and other obligations on a conduit basis. The Authority has adopted the Authority Resolution in accordance with state law authorizing the issuance of the Bonds for the benefit of the Corporation and the University, in order to finance the acquisition and construction of a multi-purpose stadium facility.

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The stadium will be used primarily to serve the athletic programs of the University and as a venue for a variety of other campus-related activities, such as graduation ceremonies. The Authority anticipates issuing the Bonds in an aggregate stated principal amount sufficient to generate approximately \$2 of net proceeds.

The University is a fully accredited public university located within the State that functions as a separate and distinct institution of higher learning. The University is one of a number of public universities located throughout the State that comprise the University System. The University System was established by the State to provide public higher education to qualified residents of the State and others. The State maintains substantial financial control over the finances of the University System, and appropriations from the State general fund are the predominant source of revenue for the University System. The Trustees of the University System (the "Trustees") is the governmental body established to oversee the operation of the University and the other university campuses comprising the University System. The campus Presidents serve as the chief executive officers of the respective university campuses.

The Trustees consists of five ex officio members, the Governor, the Lieutenant Governor, the Speaker of the State Assembly, the Superintendent of Public Inspection, and the person named by the Trustees to serve as Chancellor of the University System, and 16 appointive members who are selected by the Governor subject to confirmation by two-thirds of the State Senate.

The Corporation is a § 501(c)(3) organization that was formed on the initiative of the administrators of the University as an "auxiliary organization" in order to facilitate the development of the University campus under a master plan adopted by the Trustees. The Trustees have decided that it is more appropriate and effective to use auxiliary organizations, such as the Corporation, to perform certain functions that would otherwise be performed directly by the University. Auxiliary organizations such as the Corporation are required to operate in conformity with policy of the Trustees and the University. According to the Trustees, auxiliary organizations can more effectively accomplish certain administrative functions, "rather than the usual governmental budgetary, purchasing, and other fiscal procedures."

The Corporation has been created under, and performs its functions pursuant to, a framework of State statutes enacted for the express purpose of establishing auxiliary organizations to assist the individual campuses of the University System in performing the educational mission of each. The Corporation is engaged in functions related to housing services and the

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acquisition and development of real estate, which are "an integral part of the educational mission" of the University. The activities that the Corporation proposes to undertake in connection with the issuance of the Bonds and the acquisition and construction of the facilities to be financed therewith are within the purposes of the Corporation and are representative of the campus development activities that are the primary focus of the Corporation's activities.

The Corporation has a board of directors, the members of which must be selected by the board of directors from a slate of nominees submitted to the board by the President of the University. The board of directors has the power to remove any director, except that the President of the University, must, at all times, be an ex-officio director of the Corporation. The sources of the Corporation's funds are grants, gifts and other donations, and excess funds from self-supporting commercial services (e.g., bookstores) operated by the Corporation. These funds must be received and disbursed according to the financial control and oversight of the University System. All programs and budgets of the Corporation must be reviewed by the President of the University. Should the President of the University determine that any program or appropriation planned by the Corporation is not consistent with the policy of the Trustees and the University, the program or appropriation may not be implemented. The President may also discontinue a previously approved program or appropriation. All records of the Corporation are required to be open and available to the Trustees for audits. Annual fiscal audits of the Corporation's funds, conducted according to standards adopted by the University System, are required.

No part of the net earnings of the Corporation may inure to the benefit of any private individual. Upon dissolution of the Corporation, the net assets of the Corporation are required to be distributed to a successor § 501(c)(3) organization approved by the University.

Law and Analysis

Section 103(a) provides that gross income does not include interest on any State or local bond. Section 103(b)(1) provides that § 103(a) does not apply to any private activity bond which is not a qualified bond (within the meaning of § 141). Section 103(b)(3) provides that § 103(a) does not apply any bond that does not meet the applicable requirements of § 149.

Section 141(a)(1) provides that a "private activity bond" is any bond issued as part of an issue that satisfies the private business use test of § 141(b)(1) and the private security or payment test of § 141(b)(2), or the private loan financing test of § 141(c).

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Section 141(b)(1) provides that an issue meets the private business use test if more than 10 percent of the proceeds of the issue are to be used for any private business use.

Section 141(b)(6)(A) provides that for purposes of § 141(b), the term "private business use" means use (directly or indirectly) in a trade or business carried on by any person other than a governmental unit.

Section 141(b)(2) provides that an issue meets the private security or payment test if principal or interest payments on more than 10 percent of the issue's proceeds are directly or indirectly (A) secured by any interest in property used or to be used for a private business use, (B) secured by any payments in respect of property used or to be used for a private business use, or (C) derived from payments (whether or not to the issuer) in respect of property, or borrowed money, used or to be used for a private business use. Security or payment may be found under the terms of the issue or in any underlying arrangement.

Section 141(e)(1)(G) provides that a qualified 501(c)(3) bond is a qualified bond.

Section 145(a) provides that, except as otherwise provided in § 145, the term "qualified 501(c)(3) bond" means any private activity bond issued as part of an issue if all property that is to be provided by the net proceeds of the issue is to be owned by a 501(c)(3) organization or a governmental unit, and such bond would not be a private activity bond if § 501(c)(3) organizations were treated as governmental units with respect to their activities that do not constitute unrelated trades or businesses, determined by applying § 513(a). For this purpose, paragraphs (1) and (2) of § 141(b) are applied by substituting "5 percent" for "10 percent" each place it appears and "net proceeds" for "proceeds" each place it appears.

Section 150(a)(4) provides that the term "501(c)(3) organization" means any organization described in § 501(c)(3) and exempt from tax under § 501(a).

Under Revenue Ruling 57-128, 1957-1 C.B. 311, the following factors are taken into account to determine whether an entity is an instrumentality of one or more governmental units: (1) whether the organization is used for a governmental purpose and performs a governmental function; (2) whether performance of its function is on behalf of one or more states or political subdivisions; (3) whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner; (4) whether control and supervision of the organization is vested in a public authority or authorities; (5) whether express or implied statutory or other authority is

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necessary for the creation and/or use of the instrumentality, and whether this authority exists; and (6) the degree of financial autonomy of the entity and the source of its operating expenses.

Applying the criteria of Rev. Rul. 57-128 to the facts as represented, we conclude that the Corporation is an instrumentality that acts solely for and on behalf of the State. The Corporation performs a governmental function on behalf of the State since its express function is to facilitate the development of the University campus and assist the University in performing its educational mission. The University is one of the public universities that comprise the University System, and the University System is used for a governmental purpose and performs a governmental function on behalf of the State.

The sole purpose of the Corporation is to perform certain functions that would otherwise be performed by the University, and it must conform to policy of the Trustees and the University. Although the Corporation's board selects its own directors, one of the directors must be the President of the University, and the board must choose its directors from a slate of nominees provided by the President. The Corporation is a § 501(c)(3) organization, with no inurement of its net earnings to a private individual. Upon dissolution of the Corporation, the Corporation's net assets shall be distributed to a successor § 501(c)(3) organization approved by the University. The Corporation's funds must be received and disbursed subject to the control of the University System, the President of the University must review all programs and budgets of the Corporation and may discontinue any program or appropriation of the Corporation, and annual fiscal audits of the Corporation are required.

Conclusion

The Corporation satisfies Rev. Rul. 57-128. Accordingly, we conclude that the Corporation is an instrumentality of the State. The trade or business of an instrumentality is that of the governmental unit for which it acts. Cf. Rev. Proc. 82-26, 1982-1 C.B. 476. Thus, the trade or business of the Corporation is that of a governmental unit and is, therefore, not private business use within the meaning of § 141(b).

Except as specifically ruled above, no opinion is expressed concerning this transaction under any provision of the Code or regulations thereunder. Specifically, no opinion is expressed concerning whether interest on the Bonds is excludable from gross income under § 103(a). Neither is any opinion expressed on the effect of any subsequent action or event that is inconsistent with the facts and representations stated herein.

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This ruling is addressed only to the taxpayer who requested it. Section 6110(j) (3) provides that it may not be used or cited as precedent.

Sincerely yours,

Assistant Chief Counsel
(Financial Institutions & Products)

By:


Timothy L. Jones
Assistant to the Chief
Branch 5

Enclosure:
Copy for § 6110 purposes